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Nos. 04-1528 and 04-1530

In The Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT-INTERVENORS' BRIEF IN RESPONSE AND PARTIAL OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's limits on campaign contributions to candidates for office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch and Libertarian Party of Vermont: *Petitioners in 04-1528*;

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee – Fund for Independent Political Expenditures, Marcella Landell and Donald R. Brunelle: *Petitioners in No. 04-1530*;

William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530*;

Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey (deceased), Phil Hoff, Frank Huard, Karen Kitzmiller (deceased), Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters and Rural Vermont state that they have not issued shares to the public and that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

Respondent-Intervenors Vermont Public Interest Research Group, *et al.*, join in the Statement of the Case set forth in the brief of Respondents William H. Sorrell, *et al.*

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that Vermont's campaign expenditure limits may be upheld consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), in view of the compelling governmental interests the limits serve. Respondent-Intervenors nevertheless agree that this Court should grant review of this issue. The Courts of Appeals are divided on the question of whether *Buckley* erects a *per se* bar to expenditure limits, and the constitutionality of candidate expenditure limits is a question of exceptional national importance which this Court has not addressed in the nearly thirty years since *Buckley v. Valeo* – a period of immense change in campaign finance and its impact on governance and elections.

Vermont's experience demonstrates that limits on contributions alone, without limits on candidates' overall campaign expenditures, are inadequate to serve the state's compelling interest in deterring the reality and appearance of corruption. Under a system of unlimited campaign expenditures, officeholders faced with difficult choices about legislative issues must constantly weigh the possibility that an opponent will out-raise and out-spend them if they alienate an interest with deep financial pockets. Candidates therefore remain dependent on special interests that can generate large aggregate contributions for the campaign funding arms race, fueling the public's perception that legislative policy and access are for sale.

Buckley's regime of unlimited campaign spending also has created relentless pressure on officeholders to become

full-time fundraisers, interfering with their ability to carry out the duties for which they were elected. It has diminished robust public debate of the issues as incumbents build ever-larger war chests that deter competitors and leave many elections effectively uncontested.

In the wake of the Second Circuit's decision, spending limits legislation already is pending in at least three states. If this Court delays resolution of the division among the circuits on this issue, state and local governments will face intolerable uncertainty and confusion over the constitutionality of such reform measures. The prevailing uncertainty over the constitutionality of spending limits is heightened by the fact that members of this Court in recent years repeatedly have suggested that the Court may need to review *Buckley*'s treatment of spending limits. Without this Court's guidance, state and local governments will be forced to litigate the constitutionality of spending limits under unsettled and conflicting legal standards, burdening their resources and those of the judicial system. The Court should, therefore, grant the petitions with respect to the first question presented in each petition.

The Court should deny review of the remaining questions presented in the petitions, as none of them presents an issue warranting this Court's consideration. There is no division among the circuits concerning the constitutionality of limits on campaign contributions, an issue on which this Court provided clear guidance only five years ago in *Nixon v. Shrink Missouri Gov't PAC* ("*Shrink*"), 528 U.S. 377 (2000). Similarly, no circuit conflict exists concerning the constitutionality of Vermont's rebuttable presumption concerning coordination of political party and committee expenditures, and this narrow issue does not warrant the Court's review. Accordingly, the petitions should be denied as to those issues.

ARGUMENT

I. THE COURT SHOULD REVIEW THE CONSTITUTIONALITY OF VERMONT'S EXPENDITURE LIMITS BECAUSE THE CIRCUIT COURTS ARE DIVIDED ON A CONSTITUTIONAL ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

A. The Circuits Are Divided.

As petitioners note, the Second, Sixth and Tenth Circuits are divided on whether campaign spending limits may be upheld consistent with the First Amendment. The Second Circuit has ruled that campaign spending limits may be upheld if they are narrowly tailored to serve the state's compelling interest in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials," App. 144a,[1] while the Sixth and Tenth Circuits have ruled that *Buckley* precludes the constitutionality of campaign spending limits regardless of the facts and legal interests supporting them, *see Homans v. City of Albuquerque*, 366 F.3d 900, 914-21 (10th Cir.), *cert. denied*, 125 S.Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998).[2] *See also* App.113a (expressly noting circuit conflict).

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[1] "App." refers to the Randall Petitioners' Appendix; "Resp. App." refers to the Appendix of Respondent-Intervenors.

[2] Like the Second Circuit panel, the panels addressing this question in the Sixth and Tenth Circuits were themselves divided on the issue, underscoring the need for this Court's guidance. *See Kruse v. City of Cincinnati*, 142 F.3d at 920 (Cohn, J., concurring) (expressly disagreeing with panel majority's holding that *Buckley* categorically invalidates campaign expenditure limits); *Homans v. City of Albuquerque*, 366 F.3d at 908 (Lucero, J., concurring) ("*Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances.").

B. Delay in Resolving the Circuit Split Will Create Intolerable Uncertainty for State and Local Governments and the Federal Courts.

Even before the *Landell* ruling, state and local governments in three circuits had determined that unlimited campaign expenditures by candidates harm critical governmental interests in a manner not foreseen by the *Buckley* Court, and had sought to enforce mandatory limits on campaign expenditures as a means of redressing these harms.[3] The Second Circuit's ruling has only intensified the interest of state and local governments in establishing spending limits for their elections. In the wake of the Second Circuit's decision, legislation to impose limits on candidates' spending in state elections already is pending in Massachusetts, North Carolina and Oregon, and is about to be introduced in Wisconsin.[4] Given that

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[3] Vermont enacted its reform legislation in 1997. In 1995 the Supreme Court of Ohio sought to protect its judicial elections from the corrosive effects of unlimited fundraising by amending its judicial code of ethics to set campaign expenditure limits for Ohio's judicial elections. *See Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (affirming grant of preliminary injunction against spending limit), *cert. denied*, 525 U.S. 1114 (1999). That same year the City of Cincinnati enacted spending limits for candidates seeking municipal office. Cincinnati Ordinance 240-1995 (struck down in *Kruse v. City of Cincinnati*). Albuquerque, New Mexico, sought to enforce mandatory expenditure limits for its municipal elections throughout the post-*Buckley* period, *see Homans v. City of Albuquerque*, 366 F.3d 900. In addition, members of Congress have introduced campaign spending limit bills at least fifteen times since this Court's ruling in *Buckley*. *See* S. 1502, 106th Cong. (1999); H.R. 3851, 105th Cong. (1998); S. 1057, H.R. 77, H.R. 243, H.R. 1366, 105th Cong. (1997); H.R. 3651 and H.R. 3658, 104th Cong. (1996); H.R. 3571 and H.Res. 168, 103rd Cong. (1993); H.R. 1456, 101st Cong. (1989); H.R. 2473, 100th Cong. (1987); S. 59, 99th Cong. (1985); S. 1684 and S. 1185, 98th Cong. (1983).

[4] *See* H.B. 118, 184th Gen. Ct. (Mass. 2005) (*available at* http://www.mass.gov/legis/bills/house/ht00/ht00118.htm) (proposing limits on

(Continued on following page)

over thirty states had laws limiting campaign spending prior to *Buckley*, *see Developments in the Law – Regulation of Political Campaigns*, 88 Harv. L. Rev. 1233, 1254-55 & n.121 (1975), it is highly likely that additional jurisdictions will propose and enact spending limits legislation in response to the Second Circuit's decision.

In light of the strong interest of state and local governments in enacting spending limits legislation, and the irreconcilable conflict among the circuits on this issue, this Court should not deny review to await developments on the remand ordered by the Second Circuit. The lengthy period of delay that would result before resolution of the circuit conflict would impose severe burdens on state and local governments considering campaign finance reform proposals or facing litigation over such proposals. Jurisdictions will be forced to litigate this critical constitutional issue without knowing whether to follow the analysis of the Second Circuit, which contemplates a detailed evidentiary examination of the justifications for spending limits

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campaign expenditures for all general, special, and primary elections for state office, ranging from $54,000 for candidates for the office of state representative to $3 million for candidates for the office of governor); H.B. 1533, Gen. Assem., 2005-2006 Sess. (N.C. 2005) (*available at* http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1533v0.html (proposing to limit campaign expenditures to no more than 75% of the median amount spent by candidates in the last two comparable elections for the same office, *see id.* at § 2); H.B. 3270, 73rd Or. Legis. Assem., Reg. Sess. (Or. 2005) (*available at* http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro.html) (proposing to limit candidates' contributions to their own campaigns: candidates for statewide office would be limited to contributing no more than $50,000, and candidates for other offices would be limited to contributing no more than $10,000, of their own funds to their campaigns, *id.* at § 9). In Wisconsin, a legislator has requested preparation of a bill limiting candidate spending in state elections. Letter dated June 7, 2005 from Representative Joseph Parisi to Jay Hecht, Executive Director of Wisconsin Common Cause. Resp. App. 1a.

and their degree of tailoring, or that of the Sixth and Tenth Circuits, which renders spending limits automatically unconstitutional regardless of the facts and legal interests asserted.

The prevailing uncertainty over the constitutional analysis applicable to spending limits is heightened by the fact that several members of this Court in recent years have suggested that the Court may need to review *Buckley*'s treatment of campaign expenditures.[5] The emergence of a circuit conflict on this issue now makes the Court's guidance imperative to forestall wasteful litigation that otherwise will burden state and local governments and the judicial system.

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[5] *See Shrink*, 528 U.S. at 403-04 (Breyer, J., joined by Ginsburg, J., concurring) (calling for an approach that balances competing constitutional interests and suggesting that courts "should defer to [a legislature's] political judgment that unlimited spending threatens the integrity of the electoral process"); *id.* at 398 (Stevens, J., concurring) ("Money is property; it is not speech."); *id.* at 409 (Kennedy, J., dissenting) (noting the difficulty of constitutional issues surrounding campaign regulation but stating: "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 649-50 (1996) ("*Colorado Republican II*") (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment."). *Cf. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit *Buckley*'s general approach to expenditure limits, "some have argued that such limits could be justified in light of post-*Buckley* developments in campaign finance").

Moreover, a remand to the district court is unlikely to eliminate the circuit conflict or significantly benefit this Court's eventual consideration of the issue. Even if the district court or court of appeals were eventually to hold that Vermont's particular limits are insufficiently narrowly tailored, the Second Circuit's holding that appropriately tailored spending limits may be upheld under the First Amendment would stand. The conflict with the Sixth and Tenth Circuits therefore would remain. Accordingly, a grant of certiorari on this issue should not await the remand ordered by the Second Circuit.

C. The Issue Is of Exceptional Importance.

Petitioners are correct that the importance of the constitutional issue is beyond dispute, but their account of the issue's significance is incomplete. When courts confront a legislative enactment regulating the role of money in the political process, "constitutionally protected interests lie on both sides of the legal equation." *Shrink*, 528 U.S. at 400 (Breyer, J., concurring).

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection."

McConnell v. Federal Election Comm'n, 540 U.S. 93, 223-24 (2003) (*quoting Burroughs v. United States*, 290 U.S. 534, 545 (1934)). The view that *Buckley* automatically invalidates spending limits endangers the ability of Congress, states and municipalities to respond to serious threats to their democratic processes. The Court should grant review to affirm that the Second Circuit correctly rejected this rigid view of *Buckley*.

1. Contribution Limits Alone Have Proven Insufficient to Deter Corruption and Its Appearance.

Buckley and subsequent decisions of this Court have recognized the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption and undue influence. *McConnell,* 540 U.S. at 143-54; *Buckley*, 424 U.S. at 26-27. The *Buckley* Court, however, predicted that contribution limits alone would be sufficient to deter the appearance and reality of corruption, even if spending remained unlimited. 424 U.S. at 55-56. *Buckley*'s judgment was necessarily a predictive one, because neither campaign contributions *nor* spending in congressional campaigns were subject to meaningful limitations prior to enactment of the limits reviewed in *Buckley*.

The record here demonstrates that, in the nearly thirty years since *Buckley*, the Court's prediction about contribution limits has proven wrong. App. 128a-135a & n. 13. In the years following *Buckley,* Vermont elections, like those at the federal level, have been conducted with limits on contributions but no limits on spending. Vermont's experience demonstrates that, when candidates face an unlimited need for campaign funds, limits on contributions by a particular individual or political committee do not address the concentrated financial power that well-funded interests can exert. Under a system of unlimited campaign expenditures, officeholders faced with difficult choices about legislative issues must always weigh the possibility that an opponent will out-raise and out-spend them if they alienate an interest with deep financial pockets. Each dollar is irreplaceable because it may be necessary to assure parity with, or an advantage over, an opponent.

Candidates' unlimited need for funds therefore makes them particularly dependent on special interests that can

generate the largest aggregate contributions. As the Second Circuit found:

> [B]ecause of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds. . . . If legislation alienates one major special interest group, officials are reluctant to alienate others because the number of entities and people making political contributions is finite and small. App. 131a.

This concern is anything but abstract. A Vermont senator who sponsored a bill concerning the labeling of genetically engineered food testified that she could not get support from senate leadership because the pharmaceutical industry was already withholding campaign donations based on the party's legislative proposals. The senate president told her, "We've already lost the drug money, and I don't need to lose the food manufacture[r] money too. So I'm not going to sign the bill." App. 131a (citing testimony of Senator Cheryl Rivers). A former Republican Lieutenant Governor of Vermont said, "You have to initially consider it as whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election," Tr. VIII-26 (Peter Smith),[6] and acknowledged weighing that concern in casting a tie-breaking vote on legislation affecting industry contributors. *Id.* at Tr. VIII-39-41. Another senator acknowledged

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[6] In this brief, "Tr." refers to the trial court transcript, which was filed in full as part of the record before the Second Circuit; "Exh." refers to trial exhibit volumes also filed as part of the record below.

that, because of the influence of money, "there is an agenda out there that is pretty much set by folks that are not elected." App. 132a (quoting testimony of Senator Elizabeth Ready).

As the Second Circuit found, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns." App. 134a. *See also* App. 133a (noting that "'bundling' smaller contributions from a particular company or industry" is one practice through which concentrated financial interests leverage their influence with elected officials despite contribution limits).[7]

Spending limits alter this dynamic. When a candidate knows the upper limit of funds that will be necessary for a campaign, the pressure to court a particular special interest based on its financial clout is reduced, since each additional dollar no longer is irreplaceable. Candidates will no longer be locked into "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII-57 (Peter Smith).

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[7] An officeholder's calculation of legislative policy based on financial support is not merely a benign example of legislative responsiveness to supporters generally. "[S]uch influence of campaign contributors is pernicious because it is bought. . . . Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it." App. 134a.

2. States Have a Compelling Interest in Preserving the Time of Officeholders and Candidates.

Vermont's spending limits serve the state's compelling interest in preserving the time of officeholders and candidates from the demands of fundraising, so that they may better perform their duties as representatives. The Court should grant review to affirm that *Buckley* does not bar states from addressing this critical interest through limits on campaign spending.

As the court below found, "unlimited [campaign] expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests," App. 139a, and "financial necessity requires that elected officials spend time with donors rather than on their official duties." App. 142a.

> [T]he evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time. Special interests, well placed to take advantage of candidates' fear of losing this fundraising war, dominate candidates' time and thereby have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly consuming the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions. App. 140a.

The Second Circuit correctly determined that *Buckley* did not foreclose consideration of the compelling governmental interest in candidate time-preservation as a basis for spending limits. App. 138a-139a. *Cf. Shrink,* 528 U.S. at 409 (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state

legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."); *Homans v. City of Albuquerque*, 366 F.3d at 911 (Lucero, J., concurring) (*Buckley* did not address the "wholly separate" interest in preserving officeholders' time.); *Kruse v. City of Cincinnati*, 142 F.3d at 920 (Cohn, J., concurring) ("It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties . . . is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.").[8]

The interest in preserving the time of elected officials and candidates clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. App. 138a-139a. The former is based not on an arbitrary view of how much spending is "too much," but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1283 (1994). *See also* Richard Briffault, Nixon v. Shrink Missouri

[8] Petitioners argue that *Buckley* implicitly rejected the officeholder time-protection rationale as a compelling governmental interest. But the Court's careful description in *Buckley* of the governmental interests proffered in support of campaign spending limits, 424 U.S. at 55-57, makes no mention of the time-preservation interest, and the Court's opinion cannot fairly be read to have ruled upon it. *See* App. 138a-139a.

Government PAC: *The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1769-70 (2001).

3. Alternative Grounds for Affirming the Second Circuit's Ruling Present Equally Important Issues for This Court's Consideration.

Granting review of Vermont's expenditure limits will allow the Court to address additional important issues that present alternative grounds for affirming the Second Circuit's decision. *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (court may affirm on any ground that law and record permit that does not expand relief granted below).

a. The Critical Interest Served by Electoral Competition Deserves Consideration as a Basis for Spending Limits.

A robust public debate of the issues in an election is impossible in the absence of electoral competition among candidates. Under a system of unlimited campaign spending, candidates build campaign war chests with the specific purpose of deterring challengers from coming forward. Unlimited campaign spending, by undermining the very conditions needed to promote a debate that is "uninhibited, robust, and wide-open,"[9] thus threatens, rather than promotes, First Amendment values.

The implications for democratic governance are deeply disturbing. As an expert report in this case points out:

> Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a

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[9] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

> democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable.
>
> Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose[] a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Exh. Vol. III at E-1044-45 (report of Dr. Donald Gross).

Petitioners, through the emphasis they place on the claim that spending limits harm challengers, implicitly confirm the importance of competitive elections for a functioning democracy. Indeed, Judge Winter's dissent presents the supposed "incumbent protection" resulting from spending limits as perhaps the central issue at stake in the constitutional calculus. App. 245a-250a. Respondent-Intervenors agree that this case presents an excellent vehicle through which this Court may address the critical issue of how unlimited campaign spending affects electoral competition. The factual record, however, belies the uncritical assumption that unlimited campaign spending is a boon to challengers.

Vermont has conducted its elections without limits on campaign spending since 1976. Nevertheless, during the nine election cycles prior to the enactment of Act 64, only one incumbent lost a campaign for any statewide office. For the office of State Treasurer, the incumbent had no major opposition in five of the previous nine races; for Secretary of State, the incumbent had no major challenger in four of the previous nine races; for Attorney General, the incumbent had no major challenger in six of the previous nine campaigns. Exh. Vol. V at E-1692-94.

In elections for Congress, campaign expenditures also have remained unlimited since 1976. Congressional

incumbents nevertheless have consistently enjoyed re-election rates of over 90%. Exh. Vol. III at E-1046 (expert report of Dr. Donald Gross). In 2002, 98% of House incumbents won re-election.[10] Challengers for a House seat raised $192,945 on average in 2004, while House incumbents raised an average of $1,122,385.[11]

Put simply, unlimited campaign spending cannot help a challenger unless he or she is able to raise and spend more money than the incumbent. This scenario is relatively rare. Incumbents generally have an easier time raising money for their races than challengers because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III-212 (Dr. John Lott); Tr. X-80 (Dr. Donald Gross); Tr. IX-231-32 (Anthony Pollina). Indeed, in the three election cycles prior to the enactment of Act 64, the only gubernatorial candidate to spend in excess of Act 64's expenditure limits was incumbent Governor Howard Dean, in his 1998 race. Exh. Vol. III at E-0987-89; *see also* App. 42a-44a.

More typically, the many advantages enjoyed by incumbents – including their greater name-recognition, greater exposure to the public through news coverage of their activities, and even, as cited by Judge Winter, the use of state government websites to display their photos and accomplishments in office, App. 214a-216a & n.8 – are simply compounded by the incumbents' ability to outspend the challengers. Even Petitioners' witnesses confirmed that the worst-case scenario for a challenger is when an incumbent's built-in advantages are combined with the

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[10] Center for Responsive Politics, *2004 Election Overview, Incumbent Advantage-All Candidates* (*available at* http://opensecrets.org/overview/incumbs.asp?cycle=2004).

[11] *Id.*

ability to outspend the challenger. *See, e.g.* Tr. I-210 (Patrick Garahan).[12]

Research further demonstrates that, for challengers to be competitive, the important factor is not the absolute level of their spending, but the ratio between their spending and that of the incumbent. Examination of legislative races in numerous states shows that challengers can be competitive if they are able to spend at least 50% of what the incumbent spends. Exh. Vol. III at E-1048 (Gross report). Act 64 actually goes further and guarantees that any challenger who is able to raise the full amount permitted by the limits will be able to outspend the incumbent, because the spending limits applicable to incumbents are lower than those applicable to challengers. App. 7a.[13] The pro-competitive impact of this system is confirmed by one

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[12] *See also* Exh. Vol. VIII at E-3076-77 (petitioners' witness Kurt Wright testifying that spending limits would have benefited his effort to defeat incumbent in Burlington mayoral race); Tr. I-68-70 (petitioners' witness Peter Snelling testifying that challengers are typically underfunded, so spending limits may help challengers.)

[13] Any candidate who is unable to raise the full amount permitted by the spending limit obviously is not harmed by the limit. Indeed, some of the petitioners in this case were badly outspent by the incumbents they challenged, and had never been able to raise sums for their campaigns as large as those permitted by the limits they are challenging. *See* Tr. II-32, 34 (Vermont Libertarian Party chair Scott Berkey raised only $100 for his 1998 state senate campaign, while his incumbent opponent spent $13,663.); Exh. Vol. V at E-1755 (petitioner Donald Brunelle raised only $436 in his race against an incumbent for a Vermont House seat in 1994.) *See also* Tr. III-19-21 (as candidate for Vermont House in 1992, 1994, and 1998, petitioner George Kuusela never raised more than $1,550; spending limit under Act 64 would be $3,000.). Notably, Senate incumbents in Vermont spent more money than challengers in each of the three election cycles that were studied. Exh. Vol. III at E-0990. In the Vermont House, while challengers on average spent slightly more than incumbents, both challengers and incumbents spent less than the Act 64 limits would allow, and the limits therefore would not impede House challengers. *Id.* at E-0991.

of Petitioners' expert witnesses, whose research indicates that imposing lower spending limits on incumbents than on challengers would make campaigns more competitive. Tr. III-217-19 (Dr. John Lott).

Respondent-Intervenors acknowledge that *Buckley*'s analysis often is read to reject the governmental interest in competitive elections as a basis for campaign spending limits. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."). *But see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. at 402 (Breyer, J., concurring) (discussing this passage from *Buckley* but noting that "those words cannot be taken literally"); *Homans v. City of Albuquerque*, 366 F.3d at 913 (Lucero, J., concurring) ("[N]othing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits.") Given the importance of electoral competition for a functioning democracy, and the strong evidence that unlimited campaign spending, by deterring electoral competition, undermines the very conditions necessary for a robust public debate of the issues, *Buckley*'s holding should be revisited to the extent necessary to permit consideration of this critical governmental interest as an alternative basis to uphold the Second Circuit's judgment.

b. The Broader Governmental Interest in Political Equality Among Citizens Also Deserves Consideration as a Basis for Spending Limits.

Even if unlimited campaign spending did not serve to entrench incumbents, states should be free to weigh the fundamental value of political equality among citizens as a justification for spending limits. By too readily assuming

that the expenditure of money on a campaign deserves the same protection as political speech itself, the *Buckley* Court has made the political marketplace the special province of the winners in the economic marketplace. Given the vast inequalities of wealth in this nation, this outcome is antithetical to democratic ideals. *Cf. Nixon*, 528 U.S. at 401 (Breyer, J., concurring) (recognizing an important constitutional interest in restrictions that "aim to democratize the influence that money itself may bring to bear upon the electoral process"); *Landell v. Sorrell*, No. 00-9159(L) at 14 (2d Cir. May 11, 2005) (Calabresi, J., concurring in denial of rehearing en banc) (urging that reconsideration of *Buckley* is "essential" on this and other grounds).

The growing importance of personal wealth in determining who may hold elected office impoverishes our democracy because the capacity for leadership in public service is not confined to those with limitless access to wealth. It is no accident that some 43% of the newly elected members Congress in 2002 had net worths of over one million dollars, compared to only 1% of the U.S. population. Jonathan D. Salant, *Nearly half of congressional freshmen are millionaires*, Detroit News, Dec. 25, 2002 (*available at* http://www.detnews.com/2002/politics/0212/27/politics-44180.htm).

As the record in this case shows, a regime of unlimited campaign spending makes great personal wealth a primary factor not only in determining who can run for office, but also in determining who has access to officeholders after the election. *See* App. 134a. A candidate's greater responsiveness to wealthy interests that can generate the largest aggregate contributions, at the expense of non-contributors, is offensive to democracy when so many

citizens lack the means to make even minimal financial contributions to campaigns.[14]

The Court should revisit and, if necessary, reverse *Buckley* to the extent it precludes state legislatures from balancing the interest in protecting the fundamental right to equal political access and participation against a candidate's interest in unfettered campaign spending.

c. The Court Should Review the Standard of Scrutiny Applicable to Vermont's Expenditure Limits.

Vermont's expenditure limits are fully constitutional under the exacting scrutiny required by *Buckley* and applied by the court below. If the Court grants review, it nevertheless should revisit the appropriate standard of scrutiny applicable to candidate expenditure limits, as an alternative basis to uphold the Second Circuit's judgment.

Where, as here, important competing constitutional interests are implicated by legislation, the Court should carefully balance the interests rather than apply a presumption of unconstitutionality. *See Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., joined by O'Connor, J., concurring); *Shrink,* 528 U.S. at 401-03 (Breyer, J., joined by Ginsburg, J., concurring).

> [I]n practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less

[14] The median Vermont household income was $32,358 in 1996, and 12.6% of the Vermont population had income below the poverty line. Exh. Vol. V at E-1740. Only 370 individuals made contributions of over $400 to candidates for statewide office in Vermont in 1998. Exh. Vol. III at E-0980.

> restrictive alternative). Where a legislature has significantly greater institutional expertise as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments – at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.

Shrink, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring); *see also Bartnicki*, 532 U.S. at 536 (Breyer, J., joined by O'Connor, J., concurring) ("I would ask whether the statutes strike a reasonable balance between [the competing interests]."); *Hill v. Colorado*, 530 U.S. 703, 714-18, 727 (2000) (according deference to legislature after balancing interests).

Here, there are several constitutional interests that the Court should weigh against the First Amendment interests of candidates. These include the interests in "protect[ing] the integrity of the electoral process – the means through with a free society democratically translates political speech into concrete governmental action," *Shrink*, 528 U.S. at 401 (Breyer, J., concurring), and in "democratiz[ing] the influence that money itself may bring to bear upon the electoral process," *id.* *See also supra* Part I.C. (discussing Vermont's interests).[15]

As Justice Breyer has noted, the *Buckley* framework may be sufficiently flexible to comprehend this mode of scrutiny for campaign finance legislation. *Shrink*, 528 U.S.

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[15] The Vermont legislature specifically found that Act 64's provisions were necessary to implement more fully Article 8 of Chapter I of the Vermont Constitution, which declares: "That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." App. 35a.

at 403-05 (Breyer, J., joined by Ginsburg, J., concurring). If not, *Buckley* should, to that extent, be reconsidered.

Buckley's determination that spending limits require the most exacting First Amendment scrutiny rested in part on the assumption that a restraint on spending is indistinguishable from a restraint on speech itself. *See Buckley*, 424 U.S. at 19. The realities of campaign spending revealed by the record here, however, undermine that conclusion. For example, the research of Petitioners' expert, Dr. John Lott, found that increasing campaign expenditures in state and federal elections in recent years are *not* the result of an increase in the cost of getting the candidate's message out to voters, but instead are a function of the growing size of government. Tr. III-206-07. As Dr. Lott's report for this case characterized it, "*The more favors the government has to give out, the more resources that people will spend to obtain those favors.*" Exh. Vol. VI at E-2202 (emphasis added); *see also id.* at E-2264 (characterizing as a "myth" the contention that increased costs of television advertising account for increased campaign expenditures). When campaign spending is a function not of increased communication and debate, but of special interests' determination to secure favorable governmental policies, the justification for treating spending limits as a direct restraint on speech is greatly weakened.

The *Buckley* Court also assumed that, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." *Buckley*, 424 U.S. at 56. The record here shows, however, that a candidate's level of financial support often is far more dependent on the financial clout of industries with a legislative agenda than on the candidate's support from his or her voting constituency. *See, e.g.*, Exh. Vol. III at E-0783 (Bryan

Pfeiffer, "He's a Lock, But Funds Still Roll Right In," *Rutland Herald*, Oct. 2, 1996 (reporting how several executives of a Norfolk, Virginia, health care corporation, and their families, bundled large contributions to Governor Dean)).[16] Petitioner Steve Howard had fewer contributors when running as an incumbent in his 1996 House campaign than when running as a challenger in his 1992 race, yet raised nearly twice as much money in 1996. Exh. Vol. IV at E-1467-85, E-1491-1501.

In short, fundraising is no bellwether of the size and intensity of a candidate's support. *Cf. Landell v. Sorrell*, No. 00-9159(L) at 5 (Calabresi, J., concurring in denial of rehearing en banc) ("[G]iven the unequal distribution of wealth, money does not measure intensity of desire equally for rich and poor. In other words, and crucially, a large contribution by a person of great means may influence an election enormously, and yet may represent a far lesser intensity of desire than a pittance given by a poor person.").

Both courts below have found that Vermont's spending limits are set at a level that fully permits candidates to communicate their ideas and messages to the voters and run effective campaigns. App. 42a-44a; App. 152a-157a. Accordingly, and in view of the critical interests served by Vermont's spending limits, they should not be subject to an inflexible presumption of unconstitutionality. *See Shrink*, 528 U.S. at 403-04 (Breyer, J., concurring) ("We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process.").

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[16] In the 1994 gubernatorial race, Howard Dean raised more money just from health industry interests than his opponent, David Kelley, raised for his whole campaign. As one witness who testified before the legislature put it, "David Kelley was not only outspent by Howard Dean, [he] was actually outspent simply by the health care industry." Exh. Vol. I at E-0213, Exh. Vol. V at E-1706.

Alternatively, the Court should determine whether Vermont's candidate spending limits may be upheld as a content-neutral regulation of speech. A content-neutral law is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Although the *Buckley* Court never explicitly determined whether spending limits were content-based, it applied exacting scrutiny, the standard applicable to content-based restrictions.[17] *See Buckley*, 424 U.S. at 17-18 (declining to view congressional spending limits as restrictions on conduct or as time, manner and place regulations, and rejecting application of *United States v. O'Brien*, 391 U.S. 367 (1968), and *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

This Court's First Amendment jurisprudence as it has developed since *Buckley*, however, supports a determination that candidate spending limits are content-neutral, and the Court should reconsider this issue.

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that

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[17] Subsequent cases have not fully resolved whether campaign expenditure limits are content-based under the *Ward* analysis. *Compare Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in the judgment) (describing *Buckley*, in part, as "striking down content-neutral limitations on financial expenditures"), *with Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 657-58 (1994) (characterizing independent expenditure limitations in *Buckley* as content-based to the extent they were justified on equalization grounds).

> serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech . . . ."

Ward, 491 U.S. at 791 (internal citations omitted); *see also Simon & Schuster*, 502 U.S. at 122 n.* ("[S]tatutes [are] content neutral where they [are] intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others."); *Boos v. Barry*, 485 U.S. 312, 320 (1988) (O'Connor, Stevens, Scalia, JJ., plurality opinion) ("[C]ontent-neutral speech restrictions [are] those that are justified without reference to the content of the regulated speech.") (internal quotations and citations omitted).[18]

The expenditure limitations at issue here meet this standard for content-neutrality. They were not adopted because of disagreement with the message conveyed by political candidates; indeed, they are viewpoint-neutral in applying to all candidates. The government's purpose in enacting the limits relates not to the content of candidates' speech but rather to (1) avoiding corruption and the appearance thereof, *see* App. 134a, and (2) preserving the time of officeholders and candidates, *see* App. 140a. The Second Circuit confirmed the content-neutrality of Vermont's

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[18] *Ward* makes clear that the test of intermediate scrutiny applies regardless of the specific First Amendment content-neutral doctrine at issue. *See Ward*, 491 U.S. at 791 (outlining "principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular"); *id.* at 797-98 (noting that *O'Brien* analysis "is little, if any, different from the standard applied to time, place, or manner restrictions"); *id.* at 791 (incorporating test of content-neutrality derived from *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

limits when it stated, "The significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather *in eliminating this potential of being vastly outspent that leads to the 'arms race' mentality among candidates and elected officials.*" App. 149a (emphasis added).

Alternatively, expenditure limits should not be subject to a presumption of unconstitutionality because money is property, not speech. *See Shrink,* 528 U.S. at 398 (Stevens, J., concurring); *see also* Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 Vand. L. Rev. 1235 (2000).

Finally, even if the Court applies exacting scrutiny, the Second Circuit's application of that standard represents a departure from this Court's precedents. The exacting scrutiny applied in First Amendment cases such as *Burson v. Freeman*, 504 U.S. 191 (1992), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), is satisfied by the record here. Because the spending caps were set so as to allow ample communication and effective campaigning, *see* App. 152a-157a, the statute is "precisely targeted to eliminate" the problems that the statute sought to address without inhibiting political discussion and debate. *See Austin*, 494 U.S. at 660. Under these circumstances, an increase in the limit would be "a difference only in degree, not a less restrictive alternative in kind." *See Burson*, 504 U.S. at 210 (plurality opinion) (holding that prohibition on electioneering within 100 feet of polling place satisfied exacting scrutiny without a showing that the 100-foot boundary was "perfectly tailored").[19]

[19] To the extent a "least restrictive alternative" standard is applicable, the alternatives suggested by the Second Circuit are not required by this Court's precedents. To be effective, a less restrictive

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II. The Court Should Deny Review of Act 64's Presumption Concerning "Related Expenditures."[20]

17 V.S.A. § 2809(c) defines related expenditures as those "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee," App. 8a, and § 2809(d) creates a rebuttable evidentiary presumption that an expenditure by a political party or political committee that benefits six or fewer candidates is a "related expenditure." Only § 2809(d) is challenged by Petitioners in this Court.[21]

The Second Circuit's decision upheld § 2809(d) insofar as it treats related expenditures as contributions to candidates,[22] but that decision is not in conflict with any

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alternative must be both plausible and feasible. *Ashcroft v. ACLU*, 124 S.Ct. 2783, 2792 (2004); *United States v. Playboy Entm't Group*, 529 U.S. 803, 815-16 (2000). Almost by definition, a voluntary system of expenditure limits with public financing is not an effective alternative, because in any given election the compelling governmental interests served by spending limits can be thwarted by any candidate who chooses to decline the public funding. Further, once a court has found that a particular limit will allow ample communication and fully effective campaigns, a state should not be required to make the inherently impossible showing that a limit even one dollar higher would not be equally feasible in serving the state's interests. Such a test would be no different from declaring a spending limit inherently unconstitutional.

[20] Respondent-Intervenors join in the arguments presented by Respondents William H. Sorrell, *et al.*, explaining why the Court should deny review as to Act 64's contribution limits.

[21] The Vermont Republican State Committee ("VRSC") Petitioners challenged the definition of "related expenditure" in 17 V.S.A. § 2809(c) as overbroad in the court below, but have abandoned that claim in their petition to this Court, challenging only the presumption set forth in § 2809(d). The Randall Petitioners did not challenge the definition of "related expenditure" in the court below, but challenged only the presumption set forth in § 2809(d).

[22] Neither the district court nor the Second Circuit has yet ruled on whether the presumption in § 2809(d) is constitutional insofar as it

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other circuit decision and does not present an issue warranting review. The VRSC Petitioners argue that the Second Circuit's decision fails to recognize that coordination requires some element of control, cooperation or prearrangement with the candidate, placing the Second Circuit in alleged conflict with decisions of the Eighth and First Circuits. That argument simply ignores the Second Circuit's holding, which states:

> [W]e construe the phrase "facilitated by" [in § 2809(c)] as requiring some "prearrangement" or "coordination" with the candidate. Under such a construction, sharing routine information about a candidate is not sufficient to meet the "facilitated by" requirement. App. 183a (citation omitted).[23]

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would treat a related expenditure as an *expenditure by* the candidate. The district court never reached that issue because it was mooted by the district court's initial ruling striking down the expenditure limits. *See* App. 85a. On appeal, the Second Circuit upheld the presumption *only* to the extent it affects the related expenditures that are treated as contributions to candidates. It expressly reserved judgment on whether the provision was constitutional to the extent it treated a related expenditure as an expenditure by the candidate, remanding that issue for initial determination by the district court. *See* App. 168a. Because neither court below has ever addressed the constitutionality of the presumption as it applies to expenditures, that question is not ripe for this Court's review, and the Court should decline to review it. The VRSC Petitioners appear to acknowledge this, as Question 3 of their petition asks the Court to address the constitutionality of the presumption as it affects a related expenditure "subject to contribution limits." *See also* Petition at 27 (challenging provision treating covered expenditures as "subject to contribution limits to each candidate"). The Randall Petitioners, however, purport to challenge the provision as it applies both to contributions and expenditures, *see* Question 3.

[23] The Second Circuit focused on the proper interpretation of the phrase "facilitated by" because that was the only element of the definition in § 2809(c) which the Petitioners challenged as overbroad. *See* App. 182a-183a. The other portions of the definition – "solicited by"

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The VRSC Petitioners' real argument, then, is that any use of an evidentiary presumption that a particular expenditure is "related," whether or not the presumption is fully rebuttable, violates the First Amendment. Petitioners cite no case supporting such an argument, and Respondent-Intervenors are aware of none.

Nor is there any conflict with this Court's decisions in *Buckley*, *McConnell*, or *Colorado Republican II*. *Buckley* simply upheld a federal provision treating coordinated expenditures as contributions to candidates, 424 U.S. at 46-47, and *McConnell* specifically *rejected* the argument that a definition of "coordination" is overbroad and unconstitutionally vague if it permits a finding of coordination in the absence of an agreement between the candidate and the party making the expenditure, 540 U.S. at 219-22. Neither case addressed or invalidated a rebuttable presumption of coordination. *Colorado Republican II*, moreover, addressed a "conclusive presumption" of coordination, not a fully rebuttable presumption. 518 U.S. at 619.

The Randall Petitioners take a different tack, arguing that the Second Circuit's decision conflicts with *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), because the rebuttable presumption of § 2809(d) purportedly creates a more severe burden on candidates, political parties and political committees than the regulation struck down in *Iowa Right to Life*. The statute at issue in *Iowa Right to Life*, however, is very different from the statute at issue here, and far more burdensome. The Iowa provision required candidates to monitor the financial disclosure statements of third parties and to file a "statement of disavowal" and take "corrective action" within seventy-two hours of each disclosure of an independent

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and "approved by" – self-evidently require cooperation or prearrangement with the candidate.

expenditure by a third party, failing which the expenditure would be treated as an expenditure by the candidate. *Id.* at 966. The Court concluded that compelling a candidate to take such actions and make such statements burdened First Amendment rights because, among other things, such disavowals sent the implicit message that the candidate disagreed with the substance of the independent expenditure. *Id.* at 967 (disavowing an expenditure "has a strong negative connotation").

By contrast, 17 V.S.A. § 2809(d) places no burden on a candidate to take any particular action in response to an independent expenditure. It merely creates an evidentiary presumption that comes into play if, and only if, an enforcement proceeding is initiated or an opponent files a court action to have an expenditure declared a related expenditure. The presumption does not require a candidate or party to affirmatively repudiate an independent expenditure as a condition of treating it as independent. Nor does it require a candidate or party to report an expenditure as a "related expenditure," even if it falls under the terms of the presumption, so long as the expenditure was in fact independent (a matter which the candidate and political party or committee will know and about which either could testify, if necessary).

Indeed, the argument that the presumption will operate unconstitutionally by preventing political parties or committees from making truly independent expenditures is wholly speculative and unsupported by record evidence. Political parties and committees are sophisticated players within the political system, and are fully able to adapt to the minimal burden of an evidentiary presumption that is fully rebuttable. *Cf. McConnell,* 540 U.S. at 173 (rejecting facial challenge to provisions restricting soft-money contributions to state and local political parties and observing that political parties have

proven "extraordinarily flexible in adapting to new restrictions").

CONCLUSION

The petitions for writs of certiorari should be granted as to Question 1 in the petitions. The petitions should otherwise be denied.

June 15, 2005

Respectfully submitted,

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[LOGO]

STATE REPRESENTATIVE
JOSEPH PARISI
48th DISTRICT

WISCONSIN STATE ASSEMBLY

June 7, 2005

Jay Hecht, Executive Director
Common Cause of WI
P.O. Box 2597
Madison, WI 53701

Dear Mr. Hecht:

Thank you for your inquiry to my office regarding disbursement limits for Assembly and Senate candidates. On May 12, 2005, I asked the Legislative Reference Bureau to draft legislation providing mandatory disbursement limits. The legislation will set a spending limit of $100,000 for Senate general elections and $50,000 for Assembly general elections.

As you know, the Legislature is in the middle of the budget process, so getting a bill out of drafting before the budget is over seems unlikely. Hopefully, something should be available in July.

Again, thanks for your interest in this bill draft. Please feel free to contact me if you have other questions about the proposal.

Sincerely,

/s/ Joe Parisi
JOE PARISI
State Representative
48th Assembly District

No. 04-1530

JUN 24 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Despite the fact that this Court has warned that contribution limits that are too low are unconstitutional, the Second Circuit upheld Vermont's extraordinarily low contribution limits of $200-$400 per election cycle. That holding conflicts with the decisions of other circuit courts striking down comparable limits. Because of the conflict with the other circuits and with this Court, review of the contribution limits is warranted. In addition, the Act's presumption of coordination conflicts with the decisions of the other circuits and with this Court and certiorari as to this issue should be granted. Finally, all of the parties agree that certiorari should be granted to review whether the Act's expenditure limits are unconstitutional, so no further comment on this issue is warranted. Act 64 is a comprehensive campaign finance scheme and the limits on contributions and expenditures should be reviewed together.

1. Contrary to State's Contention, There Is A Conflict Regarding Contribution Limits Among the Circuits.

The State misstates the contribution issue by arguing that "[t]he Petitioners concede that there is no split among the circuits on the question of whether limits on contributions to candidates may be upheld under the First Amendment," but only ask the Court to "clarify" the law. Sorrell Br. in Opp. 25.[1] It is well-settled that contribution limits *may* be upheld by the courts, and there is no disagreement among the circuits regarding this broad concept. This is not the question presented. The question presented asks whether Vermont's $200-$400 contribution

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[1] Refers to Response and Partial Opposition to Petitions for Writs of Certiorari filed by Sorrell, *et al.*, joined by Vermont Public Interest Research Group, Inc., *et al.* in the arguments regarding contribution limits.

limits violate the First Amendment *because they are unconstitutionally low*. Pet. i.

This Court has explained that not all contribution limits will be upheld. Rather, contribution limits must be set at a level that prohibits only large contributions and allows for effective advocacy, and it is upon this standard that there is conflict among the circuits. Respondents, missing the point, state "[t]here is nothing unclear about the applicable standard for evaluating contribution limits." Sorrell Br. in Opp. 26. This Court has set forth the standard; the issue arises because some courts have heeded this Court's admonition that contribution limits can be too low to be constitutional while others appear willing to uphold limits regardless of their amount or the effects they have on campaigning.

In addition to misstating the issue by framing it in a manner far too broad, Respondents claim that there is no conflict among the circuits, because "[a]ll of the courts considering limits on contributions to campaigns since this Court's decision in *Shrink* have upheld the limits." Sorrell Br. in Opp. 26 (referring to *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000)). Respondents have merely provided a reason for the conflict. The circuit courts, since *Shrink*, have read *Shrink* as permitting *all* contribution limits, irrespective of their size, which conflicts with those circuits that have found some contribution limits to be unconstitutionally low.

Respondents cite the Ninth Circuit's decision in *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) in an attempt to bolster their claim that there is no conflict between the Ninth and Second Circuits. In that case, the Ninth Circuit upheld Montana's contribution limits of $400, $200, and $100 *per election*. Those amounts were *doubled* when the candidate participated in a contested

primary, making the limits for those candidates $800, $400, and $200 per election cycle. In addition, the court pointed out that while the legislation at issue decreased contributions from PACs and individuals, it allowed for substantial contributions to candidates from political parties, in the amounts of $15,000, $5,000, $2,000, $800, and $500, depending on the office. *Id.* at 1094. Thus, the *Eddleman* decision is entirely consistent with the Ninth Circuit's decision in *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Calif. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999), which upheld a preliminary injunction enjoining contribution limits because the limits were too low to be considered narrowly tailored. The Ninth Circuit has struck down contribution limits as too low and has only upheld limits significantly higher than Vermont's. Hence, there is a conflict between the decisions of the Ninth and Second Circuits, and review should be granted.

Respondents also cite *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000) for the proposition that there is no longer a conflict between the Eighth and Second Circuits. Sorrell Br. in Opp. 27. The Eighth Circuit, on remand from the Supreme Court, upheld Missouri's contribution limits of $1,075, $525, and $275. *Adams*, 204 F.3d at 842. However, those limits were *per election* and, when doubled, were $2,150, $1,050, and $550 per election cycle. Moreover, the contribution limits provided for an inflation adjustment provision, which Act 64 does not include.[2] Therefore, the Eighth Circuit's decision in *Adams* is consistent with its prior decisions striking down much lower contribution limits. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (invalidating $100-$300 per cycle limits); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) (enjoining $100-$300 per election limits). The Eighth Circuit has struck down limits

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[2] The Vermont bill provides that "The *expenditure* limitations contained in this section shall be adjusted for inflation by increasing them based on the Consumer Price Index." 17 V.S.A. §2805a(e) (emphasis added).

comparable to those of Act 64, and has only upheld contribution limits that were substantially higher than Vermont's. Thus, there is a conflict between the Eighth and Second Circuits.

Respondents state that since there are only one and a half months between the primary and general elections in Vermont, they "practically blend together" and "the need for a separate limit for primary election contributions" is alleviated. Sorrell Br. in Opp. 27. The District Court explained that the legislature rejected "having two different regulatory regimes for primary and general elections" so that candidates could have the freedom to decide how to spend their funds. App. 60a.[3] The fact that Vermont has chosen one regulatory scheme for the primary and general elections is irrelevant. What is relevant is that Vermont's limits, unlike those upheld by the Eighth and Ninth Circuits, do not account for the cost of two elections (a primary and a general election).

Respondents also point out that this Court has rejected requests for writs of certiorari in *Eddleman, Frank,* and *Alaska*. Sorrell Br. in Opp. 26.[4] This comes as no surprise since the limits in those cases ranged from $2,150 to $400 per election cycle.

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[3] Refers to the Appendix attached to Petition for A Writ of Certiorari filed by Randall, et al.

[4] *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000).

2. The Second Circuit's Decision Conflicts With This Court's Warning That Contribution Limits That Are Too Low Are Unconstitutional.

Chief Judge Walker, in his opinion dissenting from the Second Circuit's denial of rehearing *en banc*, described Act 64's contribution limits as "laughably low" and expressed "serious doubts" as to whether they are constitutional. App. 330a-331a. He noted that Vermont's contribution and expenditure limits are "set so low and in such a fashion that only a desire to protect incumbents can explain them." App. 331a. He criticized the Second Circuit panel majority for giving too little deference to *Buckley* and too much deference to Vermont's legislature. *Id.* Even Justice Breyer, he explained, who has proposed giving legislators more freedom to legislate in the campaign finance arena, warned against deferring to lawmakers if that deference risks constitutional evils such as "permitting incumbents to insulate themselves from effective electoral challenge." *Id.* (quoting *Shrink*, 528 U.S. at 402 (Breyer, J., concurring)).

Respondents claim that the assertion that Vermont's contribution limits "violate the principles of *Buckley* and *Shrink* . . . is meritless." Sorrell Br. in Opp. 28. However, this Court instructed in both *Buckley* and *Shrink* that contribution limits that are too low are unconstitutional. Contribution limits that are so low that they create "a system of suppressed political advocacy" are unconstitutional. *Shrink*, 528 U.S. at 396. Limits that are so low that they "prevent candidates . . . from amassing the resources necessary for effective advocacy" would "impose serious burdens on free speech." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Without a doubt, there is merit in inquiring whether Vermont has set limits so low as to be unconstitutional.

The record is replete with evidence that Act 64's contribution limits are too low to permit effective campaigning. George McNeill, a fundraising and candidate

recruitment consultant for the Republican Legislative Election Committee, testified that many candidates in Vermont state senate and house races in 1998 would have been unable to run effective campaigns under Act 64's contribution limits. Tr. II-73-101.[5] He testified that of the twenty-one house races targeted by the Republican party, nineteen would not have been able to run effective campaigns under the Act. Tr. II-99. Of the fourteen targeted senate races, ten would have been unable to run effective campaigns under the Act's contribution limits. *Id.* For example, Gerald Morrissey would have lost one-quarter of his contributions revenue under the Act's limits, and could not have effectively campaigned for state senate because he had to overcome an "entrenched senator." Tr. II-76. A candidate for Chittenden County senate, Dennis Delaney, would have been unable to mount an effective campaign under the Act's contribution limits because Chittenden County is the largest county in Vermont and the expenses are much higher than in other races. Tr. II-80. Ruth Harvie could not have effectively campaigned for the state senate under the limits because advertising for mass media in her district is expensive and "[y]ou have to spend a lot of money on small, individual newspapers." Tr. II-84-85. Joseph Tully, a "relative newcomer" would have been unable to "get the name recognition and the issue recognition that he was able to get" under the Act's limits. Tr. II-87-88. Patricia Welch, who had "been out of the political scene for five to six years" would have been prevented from acquiring the name recognition necessary for an effective campaign under Act 64's contribution limits. Tr. II-89. "When you are running for a senate race, you really have to rely on mass media to get your name, your issues and your face out there." *Id.* Harvey Smith could not have effectively campaigned under the Act. In his district, to get full coverage he would have to advertise in more than one newspaper and on two or three radio stations. Tr. II-91. "You can't advertise on just one

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[5] Refers to Trial Transcript.

[radio station] because you just don't get the coverage." *Id.* If $2000 had been removed from David Brown's campaign funds under the Act's contribution limits, "you would have been taking advertising, whether in the newspapers, TV or lawn signs. . . [or] walking banners. . . you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." Tr. II-92. McNeill testified that he did not believe that the contributions in those races that would have been lost under Act 64's limits could have been replaced. Tr. II-99-100.

McNeill testified that Act 64 has harmed the ability to recruit candidates to run for office. He explained that prospective candidates, after being invited to the statehouse and having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." Tr. II-65. Act 64's limits not only prevent effective campaigning by candidates, they also have a chilling effect on individuals deciding whether to run for office.

William Meub, who has run for governor and state senate in Vermont, testified that the $400 contribution limit to gubernatorial candidates would prohibit him from amassing the resources he needed to mount an effective campaign. Tr. IV-36. He also observed that the contribution limits drain candidates' time, making it difficult to campaign. "What you have done [by imposing the $400 limit] is you have required an increased amount of time fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning. . . ." *Id.* Meub further testified that the contribution limits are "a huge disadvantage" for challengers because they limit the acquisition of seed money from close friends. Tr. IV-40.

Sharon Toborg, treasurer of the Vermont Right to Life Political Committee and the Vermont Right to Life

Fund for Independent Political Expenditures, testified that the organization would no longer be permitted to give candidates a mailing list if the value of the list exceeded the contribution limits. Tr. IV-140. The District Court expressed concern that the contribution limits would prevent parties from contributing mailing lists to candidates. "I raise an obvious concern because the political parties have traditionally done this. . . I would like you to think about, address that particular issue, because essentially if you literally apply Act 64 to those lists, there's no way that a political party could ever share names of supporters with their candidates." Tr. IV-142-143. Such lists are an important to way to communicate a candidate's message to voters and to obtain donations necessary to run an effective campaign.

Review of this constitutional question, in light of the conflict among the circuits and the conflict with this Court, should be granted.

3. Act 64 Is A Comprehensive Campaign Finance Scheme and Its Interrelated Contribution and Expenditure Limits Should Be Reviewed Together.

The Second Circuit described Act 64 as a "comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections." App. 98a. The Act's provisions were drafted to work together in regulating Vermont's campaign finances. This Court in *Buckley*, in its discussion as to whether the contribution limits at issue discriminated against non-incumbents, stated that the "overall effect of the contribution and expenditure limitations . . . could foreclose any fair opportunity of a successful challenge." *Buckley*, 424 U.S. at 31 n.33. This Court did not express an opinion regarding the effects "resulting from the full sweep of the legislation as enacted" only because it struck down the expenditure limits, making such